STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.)

ROBERT and PATRICIA STOKES,

Plaintiffs/Appellants/
Cross-Appellees

-vs-

MILLEN ROOFING COMPANY,

Defendant/Appellee
Cross-Appellant.

_____/

Supreme Court Docket No. 119074

Court of Appeals No. 216334

Lower Court Case No. 94-3123-NZ
Hon. Donald A. Johnston, III

RESPONSE OF APPELLEE AND CROSS-APPELLANT TO AMICUS CURIAE BRIEF FILED BY BUREAU OF COMMERCIAL SERVICES

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Dated: March 22, 2002

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QUESTION PRESENTED FOR REVIEW

Amicus Curiae has formulated a question for review, which neither the Appellant nor Cross-Appellant have raised. The question formulated by the Amicus Curiae is as follows:

I. **Section 2412 of the Occupational Code plainly prohibits unlicensed contractors from bringing and maintaining an action for collection of compensation for work or services performed while unlicensed. Section 601 of the Code makes it a crime to perform work or services while unlicensed. Over the years, there has arisen in the Court of Appeals a line of authority, which has permitted recovery to unlicensed contractors based on equitable considerations. That line of authority failed to consider the criminality of the conduct and thus failed to apply the clean hands doctrine, which holds that equity will not aid a criminal wrongdoer. Should that line of authority be continued?**

The Trial Court did not answer this question because it was not presented to the Trial Court.

INTERESTS OF AMICUS

Amicus asserts an interest in the Appeal pending before this Court claiming denial of recovery or set-off to an unlicensed contractor is in the public interest. Amicus then states that requiring licensure insures a full panoply of remedies and that administrative remedies *against non-licensees are narrower than remedies available* against licensees. Amicus improperly claims that Section 2411 of the RBA applies, "exclusively to licensees and does not related to non-licensees." It also improperly claims Section 2411(2) stands for the proposition that the penalties contained in Article 6 apply only to a licensee. (Amicus Brief, page 4)

Amicus goes on to claim that Section 604 (which applies to all persons and not simply to licensees) is considerably more limited in its scope than Section 2411. Such a claim is hard to justify when Section 604 has two statements, which encompass all of Section 2411:

> "Section 604. A person who violates 1 or more of the provisions of an article which regulates an occupation or who commits 1 or more of the following shall be subject to the penalties prescribed in Section 602.
>
> . . .[c] Violates a rule of conduct of an occupation." MCL 339.604. (emphasis added)

It is difficult to understand Amicus' position. Simply stated, Section 2411 specifies rules of conduct of a licensed occupation and Section 604 incorporates those rules and applies them to any person. The scope of Section 604 is indeed broader in scope than Section 2411.

It is certainly clear that an unlicensed person as well as a licensed person is subject to the penalties set forth in Article 6. The difficulty is that the penalty, which is the focal point of argument in this case, is not found in Article 6, but is found in Article

24. The argument of the Attorney General that an unlicensed person is subject to less scrutiny or oversight than a licensed person is not justified by the plain language of the statute.

Amicus also fails to recognize that Section 624 imposes penalties under Section 602 for violations of "an article which regulates an occupation." However, the penalty, which Amicus urges, is found under Article 24. The penalty under Article 24 (§2412) is limited only to where a license is required under "this article [Article 24]." MCL 339.2412(a). The Legislature uses different words - - "an" vs. "this" and it cannot be presumed that it did not intend to use those different words. If it wanted to impose penalties for violating Article 6 above and beyond the penalties enumerated, it could have directly referenced Article 6.

Amicus also makes reference to the public policy and principles of equity as its reasons for submitting argument in this case. (Amicus Brief, page 2) Yet the Amicus does not discuss the facts of this case. A review of those facts is critical, both to understanding that the intent of the Legislature was met in this instance, and that the principles of equity were satisfied. The Court needs to know those facts.

At all times relevant to the dispute involved, there were both a licensed builder and a licensed contractor in charge of the project. Summit Construction was not only a licensed builder on the project, but Summit Construction had taken out a permit for the house addition which permit included the roofing subcontractor. Design Plus was a licensed architect on the job. In addition, the Stokes hired a second licensed architect,

Thomas Dowling, to review all the work. The Stokes also employed the services of a roofing expert from Ohio, Mr. Schuler.[1]

The Amicus Brief fails to even discuss the most critical evidence -- evidence that was fundamental to the Trial Court's Decision. Prior to their relationship with Millen Roofing, the Stokes had previously taken advantage of at least one prior contractor -- using the same "lack of license" argument. Prior to hiring Summit Construction, the Stokes had engaged the services of Sumner Construction as their general contractor. Shortly before contracting with the Stokes, Doug Sumner had incorporated his construction business. He signed his construction contract with the Stokes under the corporate name. Unfortunately, his attorney failed to advise him that he needed to change his license from his individual name to his corporate name. When the Stokes had a falling out with Sumner, he filed a construction lien. The Stokes successfully obtained Summary Disposition claiming that Sumner Construction, in its corporate form, was unlicensed. When Mr. Sumner attempted to sue in his individual name, the Stokes obtained successful Summary Disposition by claiming that they did not have a contract with the licensed individual. The Trial Court noted that fact:

> "First of all, although it certainly is true that Mrs. Stokes is a housewife who has taken on the role of serving in the stead of a general contractor for much of this massive renovation project, she has picked up some considerable contact with the legal system along the way. Notably, she was in this very court on September 3, 1993, in the Sumner Construction case, which is another piece of litigation related to this project, and, at that time and in that hearing, prevailed on an unlicensed contractor issue. That is to say, the Court granted summary disposition in her favor on an issue in the Sumner case, based on the fact that the contractor in question was not licensed in that case, either."

[1] It would be tough to identify another construction project, which had as much supervision by licensed and expert parties as did this project.

Cross-Appellant's Appendix Page 175b.

The Amicus' recitation of facts also fails to discuss the fact that Mrs. Stokes acted as a general contractor.[2] The real property was owned by the Stokes collectively, as tenancy by entireties. However, Mrs. Stokes, individually, began acting as a general contractor -- undertaking massive portions of the contract directly. The Trial Court made a number of conclusions in its Opinion regarding her conduct:

1. ... "she appears to have managed much of this herself." (Cross-Appellant's Appendix Page 166b);

2. "First of all, although it certainly is true that Mrs. Stokes is a housewife who has taken on the role of serving in the stead of a general contractor for much of this massive renovation project, she has picked up some considerable contact with the legal system along the way." (Cross-Appellant's Appendix Page 175b);

3. "I am satisfied that undoubtedly at some point she indicated to Mr. Millen that she was functioning in the role of or as if she were the contractor." (Cross Appellant's Appendix page 181b.)

The Trial Court's Opinion was well founded on the evidence presented at trial.

1. Mrs. Stokes eventually took out a building permit listing herself as contractor (Cross-Appellant's Appendix Pages 247b – 249b).

2. She signed statements under oath indicating that she was the contractor (Cross-Appellant's Appendix Pages 252b, 254b, 255b).

[2] *If Mrs. Stokes was a general contractor, then her project is exempt from the Licensing Act and the licensing* requirement does apply to Millen Roofing. MCL 339.2403(b).

3. She prepared computer spreadsheets in which she listed the people (including Millen Roofing) as her subcontractors. (Cross Appellant's Appendix Page 253b).

Finally, Amicus' brief does not discuss the fact that Patti Stokes solicited Millen Roofing and represented that it would not need a license or permits. In this way, she enticed Millen Roofing to begin immediately. (Cross Appellant's Supplemental Index, Pages 257b, 263b, 265b-267b, and 269b.)

ARGUMENT

I. AMICUS' ASSERTION: APPELLEE IS A CRIMINAL WRONGDOER

A. The Appropriate Standard of Review

Interpretation of the RBA is one which this Court may accomplish *de novo*. However, the finding of facts is not *de novo*. The trial court did not undertake a finding of facts on this issue.

B. Analysis

Amicus asserts that the fact that Millen Roofing was not licensed makes its acts criminal acts. Yet Amicus' Brief completely ignores the exception contained in MCL 339.2403(b). In this instance, Patricia Stokes was a person engaged as a residential builder. She was permitted by the RBA to act as a residential builder without a license. Amicus mocks the exception contained in Section 2403(b) and claims that, "since virtually all remodeling contracts are between a home owner and a contractor . . . virtually no projects would require a licensed contractor!" (Amicus Brief, page 10) Amicus misses the point - - Patricia Stokes was the contractor in this instance. The very premise of Amicus' statement assumes a general contract between a homeowner and a contractor. It assumes a homeowner who does not act as a contractor. The Millen contract does not meet that factual assumption. It installed only the slate roof and nothing structural. Had Millen undertaken the role as contractor, the Amicus' point would be appropriate. However, in most instances, homeowners don't act as their own contractors, but hire a contractor.

Amicus contends that the intent of the legislature was to exempt only those homeowners who physically perform their own construction work. (Amicus Brief, page

10), Such a reading of the statute is far too narrow. The definition of "residential builder" is contained in Section 2401. MCL 339.2401. At the end of the definition, it excludes someone physically working on their own property. This covers the situation described in Amicus' Brief. But Amicus then ignores the ramifications of the additional exception contained in Section 2403. Bearing in mind that a person physically working on their own house is not a residential builder (by definition), Section 2403 further allows a person to "[1] engage in the business or [2] act in the capacity of a residential builder" if the person is "an owner" of the property. This stated exception to the prohibitions of Article 6 is totally unnecessary if the scope of the exception is limited in the way that Amicus suggests. Using Amicus' interpretation, Patty Stokes would not have been a residential builder by definition. Why would Section 2403 then say that she could engage in the business or act in the capacity of a residential builder? Because, not only did the Legislature intend that someone could physically work on their own project, but it sought to provide an exception when an owner set out to be their own general contractor. When a party voluntarily undertook to be their own general contractor, the Legislature did not deem it important to cram down protections, which would be applicable to someone who was simply hiring a contractor and relying on the contractor's expertise.

II. AMICUS' ASSERTION: EQUITY SHOULD NOT REWARD A CRIMINAL WRONGDOER

A. Standard of Review

Appellee agrees with Amicus that the standard of review for the application of equitable principles is one of abuse of discretion.

B. Analysis

Even if Millen Roofing was a criminal wrongdoer, it is entitled to equity.

Amicus asserts that equity should not be granted to a criminal wrongdoer. This argument, of course, assumes that Millen Roofing committed a misdemeanor by being unlicensed in this instance. However, even if that is the case, Amicus' position fails for two principal reasons:

1) It factually misapplies the "equitable maxim that 'he who seeks equity, must do equity'".

2) It seeks to reverse a well established principle of application recognized by both the Michigan Supreme Court and the United States Supreme Court.

Amicus' position would seem to stand for the proposition that anyone who has ever committed a misdemeanor is forever barred from any rights and privileges, which accrue to it as a United States or Michigan citizen. I would certainly hope that is not the case. Each of us who is old enough to remember the days when traffic citations were considered to be misdemeanors should shudder at the logical extension of Amicus' position. Here there is no causal connection between the alleged misdemeanor and the relief provided by the trial court. In other words, there is no harm alleged to have resulted on this project as a result of Millen Roofing being unlicensed. The roof is in excellent condition. Millen completed his performance and would be entitled to payment

but for the ramifications of the RBA. Millen gained nothing by being unlicensed and the Stokes lost nothing.

Amicus appropriately quotes the "equitable maxim that 'he who seeks equity, must do equity'". Yet while acknowledging that maxim, Amicus now wants to carve a hole in that maxim and in the court's powers, and say that the maxim does not apply in this factual situation. Of course, if the legislature had intended that, it could have stated so. It might well have set up a constitutional conflict, but at least it could have stated so. The legislature did not state so.

The Amicus would carry their position so far as to claim that a party may not even claim a set-off. That would require this Court to not only overturn the many cases which Amicus has cited, but would also require this Court to overturn decisions such as Parker v McQuade Plumbing v Heating, Inc., 124 Mich App 469, 335 NW2d (1983). Parker clearly allows an unlicensed contractor to defend itself, which ability Amicus would also like to destroy.

Finally, Amicus urges a position, which would force this Court to go against all established jurisprudence including those pronouncements made by the United States Supreme Court. Amicus suggests that one who has committed a misdemeanor (a misdemeanor causing no harm nor creating any benefit) is somehow sullied to the point where it can no longer receive equity from a Michigan court. Yet the standard is clear that Millen, as a defendant in an equitable action, is entitled to receive equity irrespective of how dirty its hands are.

> " 'No citation of authority is necessary to establish that one who seeks the aid of equity must come in with clean hands.' Charles E. Austin, Inc. v Secretary of State, 321 Mich. 426, 435, 32 N.W.2d 694 (1948). The clean hands maxim is an

> integral part of any action in equity. The U.S. Supreme court captured the essence of the maxim when it said:
>
> '(The clean hands maxim) is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, **however improper may have been the behavior of the defendant**. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' Bein v Heath, 47 U.S. 228, 6 How. 228, 247, 12 L.Ed. 416.' Precision Instrument Manufacturing Co. v Automotive Maintenance Machinery Co., 324 U.S. 806, 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381 (1944). (emphasis added).
>
> Stachnik v Winkel, 394 Mich 375 at 382.

Amicus' position, while trying to find Millen's conduct as criminal, has failed to look at the soiled hands of the Appellants in this case. Even if this Court concurs that there are difficulties with the RBA, this Court should not engage in the business of legislating or correcting oversights by the Legislature. That must be left to the Legislature. More importantly, this Court cannot, as suggested by Amicus, focus on the *activities of Millen Roofing while ignoring the improper conduct of the Appellant.*

CONCLUSION AND RELIEF REQUESTED

The Stokes came to the Trial Court with unclean hands seeking equitable relief. Once the Trial Court granted equitable relief to the Stokes, it was compelled to give Millen Roofing equitable relief as well. That equitable relief should have been awarded contemporaneously with its granting any relief to the Stokes. The Republic Bank [Republic Bank v Modular One LLC, 232 Mich App 444; 591 NW2d 335 (1998)] decision was decided appropriately.

By its clear language, the Residential Builders Act does not apply to Millen Roofing. Article 24 does not require a license. Even if it would normally apply, it does not in this instance because Mrs. Stokes acted as contractor and the project she is involved with is excepted from the scope of the statute. Additionally, Millen is permitted to sue as a supplier, for which no license is required.

The purpose of the RBA was satisfied with a responsible licensed contractor and licensed architect in charge at all times.

The Trial Court correctly found that Millen's remaining counts did not seek compensation and were therefore not excluded by the RBA.

Appellee requests that this Court affirm the Decision of the Court of Appeals and the Trial Court granting equitable relief to Millen Roofing. Millen Roofing also requests that this Court reverse the Court of Appeals and the Trial Court on that portion of the

lower Courts' Decision, which dismissed Defendant's Counter-Complaint for damages and other legal relief. Millen Roofing's Construction Lien should be restored.

Respectfully Submitted,

Dated: March 22, 2002

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